United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1651

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RETIRED PERSONS PHARMACY, t/a
NRTA—AARP PHARMACY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AND CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN CASE NO. 210 NLRB NO. 65

PETITIONER'S BRIEF

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Petitioner
261 Madison Avenue
New York, New York 10016

Of Counsel

ROBERT LEWIS
ROGER S. KAPLAN

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PETITIONER'S BRIEF

RETIRED PERSONS PHARMACY, t/a NRTA—AARP PHARMACY (hereinafter "the Pharmacy"), pursuant to §10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §§151, 160 (f), petitions to review and set aside a Decision and Order of Respondent, NATIONAL LABOR RELATIONS BOARD (hereinafter "the Board"), in Case No. 5-CA-6108, dated April 30, 1974, and reported at 210 N.L.R.B. No. 65, which directs the Pharmacy to cease and desist from conduct found violative of §§8(a)(5) and (1) of the Act, and to take certain affirmative action, as hereinafter described.[1]

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[1] This Court has jurisdiction over the instant proceedings, although the alleged unfair labor practices occurred in Washington, D.C., since the Pharmacy maintains a mail-order operation in East Hartford, Connecticut. 29 U.S.C. §160(f); 28 U.S.C. §41; *J. J. Newberry Co., Inc.* v. *N.L.R.B.*, 442 F.2d 897 (2d Cir. 1971).

By cross-application, the Board seeks enforcement of its Order.

This Brief is submitted in support of the Pharmacy's petition for review.

Issues Presented For Review

1. Whether the Pharmacy was denied due process by the Board's participation in prior §10(j) proceedings.

2. Whether the Board's finding that the Pharmacy unlawfully refused to bargain resulted from an erroneous preclusion of evidence relevant to the Pharmacy's defense that the union in fact no longer enjoyed majority support.

3. Whether General Counsel failed in his obligation to prove the union's majority status upon the Pharmacy's showing that its refusal to bargain was based upon a reasonably grounded good faith doubt of continued majority status.

4. Whether the Board's finding that the Pharmacy unlawfully refused to bargain when it unilaterally changed its employees' hours of work resulted from an erroneous preclusion of evidence relevant to the Pharmacy's defense that the union in fact no longer enjoyed majority support.

5. Whether the Board erred in finding that Pharmacy counsel's pre-trial interview of unit employees was unlawful.

6. Whether the Board's failure to sever the attorney interviewing issue infringed upon the Pharmacy's right to the effective representation of counsel.

The Pharmacy maintains that these questions should be answered affirmatively.

Statement of the Case

A. Background To Proceedings.

1. *The Pharmacy's business operations.*

The Pharmacy is engaged in the sale and distribution of pharmaceutical products to members of the National Retired Teachers Association and the American Association of Retired Persons (234a).[1a]

2. *The Pharmacy's bargaining history.*

On November 29, 1971, the Board certified the Metropolitan Guild of Pharmacists (hereinafter the "Guild") as the collective bargaining representative for all pharmacists employed by the Pharmacy at its Washington, D.C. location (32a). Thereafter, the parties entered into a collective bargaining agreement which expired on May 29, 1973 (33a-47a).

On March 7,[2] the Guild advised the Pharmacy of its intent to terminate the agreement and to enter into negotiations for a new contract (48a). In response, on April 19, the Pharmacy advised the Guild that it believed that the Guild no longer continued to enjoy the support of a majority of the Pharmacists (364a, 147a, 56a). Accordingly, the Pharmacy filed a representation petition the same day in Case No. 5-RM-749 seeking a determination of the Guild's status (51a).[3]

[1a] References contained in parentheses are to the Joint Appendix herein. References preceding a semicolon are to the decisions below; those following a semicolon are to evidence in the record.

[2] All dates hereinafter referred to are in 1973, unless otherwise indicated.

[3] This petition was dismissed as untimely by the Board's Regional Director, who stated:

> ". . . [I]t appears that further proceedings are not warranted at this time as the petition was filed during the 'insulated period' of an existing contract, namely, within 60 days prior to the contract's May 29, 1973 expiration date." (49a-50a).

B. Commencement Of Unfair Labor Practice Proceedings.

1. The charges.

On May 14, the Guild filed an unfair labor practice charge alleging that the Pharmacy had violated Section 8(a)(5) of the Act by refusing to negotiate concerning a new collective bargaining agreement (5a).

On May 21, attorneys for the Pharmacy interviewed the pharmacists in order to prepare a defense to the 8(a)(5) charge (30a).

On May 22, the Guild filed an amended charge which alleged that this interviewing violated §8(a)(1) of the Act (6a).

2. The complaint.

A complaint and notice of hearing were issued by the Board on July 2 alleging that the Pharmacy acted unlawfully by:

(1) refusing to bargain on or after April 19 concerning the terms of a new contract;

(2) permitting its attorneys to interview pharmacists on May 21 "without notice to or bargaining with the Guild;" and,

(3) reducing the pharmacists' work week on May 30, after the expiration of the contract, from 42½ hours to 40 hours per week "without notice to and bargaining with the Union." (7a-9a).

3. The answer.

On July 12, the Pharmacy answered the complaint. It denied the allegations, and alleged as an *affirmative defense* that on April 19 a majority of the pharmacists did not support the Guild (11a-13a).

4. *Pre-trial motion for severance.*

On July 12, the Pharmacy moved the Board's Chief Administrative Law Judge for an order of severance as to the allegation in the Complaint that counsel's interviewing of pharmacists was unlawful. Claiming counsel's ability to effectively represent the Pharmacy was inhibited, the Pharmacy sought a separate trial of this issue prior to the trial of the other two allegations (14a-17a).[4] On August 1, this motion was denied (21a-22a).[5]

5. *The trial before the Administrative Law Judge.*

On August 14 and 15, hearings were held before an Administrative Law Judge. The Pharmacy defended its refusal to negotiate a new contract by adducing evidence concerning its reasons for doubting the Guild's continued majority status. Officials of the Pharmacy testified that fourteen of twenty-eight pharmacists had voluntarily voiced dissatisfaction with the Guild (249a-254a, 258a-260a, 301a-318a).

The Pharmacy further defended its actions in refusing to bargain and unilaterally reducing the hours of the pharmacists by seeking to adduce evidence in support of its affirmative defense that the Guild did not *in fact* have the support of a majority of the pharmacists on April 19 (387a-391a). Pharmacists who were present in the hearing room were called to testify. However, the Administrative Law Judge refused to permit them to do so and rejected an offer of proof as to their testimony (391a).

In defense of the unlawful interviewing allegations, the Pharmacy's attorneys testified that the interviews were

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[4] Counsel also sought a protective order prohibiting General Counsel from alleging further interviewing by counsel as an additional violation of §8(a)(1). *Ibid.*

[5] On August 6, counsel requested special permission from the Board to appeal this denial (23a-26a). This request was denied by the Board on August 14 (68a).

conducted solely for pre-trial preparation and were conducted in a non-coercive manner and in accordance with law (319a-321a, 331a-343a, 368a-371a, 376a-377a). The facts relating to these allegations and defenses are more fully described in Points II through VI, *infra*.

C. The Board's Petition For A §10(j) Injunction.

On September 7, following the unfair labor practice hearing, the Regional Director of the Fifth Region of the Board, petitioned the United States District Court for the District of Columbia pursuant to §10(j) of the Act, 29 U.S.C. §160(j), to enjoin the Pharmacy from engaging in conduct alleged to be in violation of §§8(a)(1) and (5) of the Act, pending final disposition of the issues before the Board (395a). This petition had been authorized and approved by the Board, see Point I, *infra*.

D. The Order Of The District Court.

On October 26, the District Court, without opinion, adopted the Board's proposed Findings of Fact and Conclusions of Law, as modified, based upon the record before the Administrative Law Judge and the briefs and arguments on behalf of both parties. The Court signed the Board's proposed Order Granting a Temporary Injunction (407a-413a). The Court concluded that there was "reasonable cause to believe" that the Pharmacy had violated §§8 (a)(1) and (5) (410a).[6]

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[6] The Court, however, did not find reasonable cause to believe that the Pharmacy had "engaged in a course of conduct designed to undermine the union's status as collective bargaining representative of Respondent's employees," as alleged by the Board in its petition for the injunction (397a-401a), and contained in its proposed findings of fact (409a). Nor did it find reasonable cause to believe that the Pharmacy's alleged unfair labor practices were "flagrant," also as suggested by the Board (400a-401a).

E. The Administrative Law Judge's Decision.

On October 30, 1973, the Administrative Law Judge rendered his decision (71a-94a). He found that: (a) the Pharmacy did not have a "good faith doubt" of the Guild's loss of majority status at the time it refused to bargain (77a-79a); (b) the Pharmacy failed to adduce evidence that a majority of the employees did not want the Guild to represent them (87a); (c) the interviewing of employees by its attorneys, "without notice or bargaining with the Guild," was unlawful (85a); and, (d) the unilateral change in the work week of employees was unlawful *(Ibid.)*.

F. The Board's Decision and Order.

In a memorandum opinion, the Board affirmed the rulings, finding and conclusions of the Administrative Law Judge (117a, n.2).

The Pharmacy appeals from the Board's Order.

POINT I

The Pharmacy Was Denied Due Process By the Board's Participation in Prior §10(j) Proceedings.

The Decision and Order in the instant case was issued after the Board granted General Counsel authorization to petition for injunctive relief pursuant to §10(j) of the Act.[7] The Board's participation in the obtaining of §10(j) relief—a prosecutive rather than adjudicative function—and its consideration of the facts of the §8(a)(5) case

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[7] The Act provides, in pertinent part:

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order. * * *" 29 U.S.C. §160(j).

upon an *ex parte* presentation by General Counsel in seeking §10(j) authorization, violated the intent of the Act and prejudiced the Pharmacy upon its later appeal of the Administrative Law Judge's Decision.

A. The Board's Present §10(j) Procedure Violates The Intent Of The Act And Prejudices A Respondent Upon Subsequent Board Review In The Related Complaint Case.

We fault the Board's current procedure for two reasons:

(1) It improperly permits the Board to perform a function of a prosecutive nature; and,

(2) It improperly permits the Board to consider, *ex parte,* facts relating to issues which ultimately it will have to resolve in a quasi-judicial capacity.[8]

1. The Board engages in a prosecutive function by participating in §10(j) proceedings.

The Board's role in passing upon General Counsel's applications for permission to seek §10(j) relief embroils the Board in the prosecution of a case which it will later have to adjudicate. This violates the Congressional mandate restricting the Board's role to an adjudicative one and contaminates the atmosphere of impartiality with which the Board is expected to decide each case on the merits.

a. The Board's current regulations for §10(j) authorization demonstrate its prosecutive involvement.

The "Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board," 20 Fed. Reg. 2175, effective April 1, 1955, requires that the Board act as General Counsel's superior in deciding whether to seek a §10(j) injunction. It provides in material part:

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[8] Siegel, "Section 10(j) of the National Labor Relations Act: Suggested Reforms For An Expanded Use," 13 BOSTON COLL. IND. & COMM. L. REV. 457, 459 (1972).

> "On behalf of the Board, the General Counsel of the Board will, *in full accordance with the directions of the Board,* . . . initiate and prosecute injunction proceedings as provided in section 10(j) . . .: Provided, however, that the General Counsel will initiate and conduct injunction proceedings under section 10(j) . . . *only upon approval of the Board. . . .*" (emphasis added).

The Board thus reserves to itself the power of ultimate approval as to whether such injunction proceedings ought to be initiated. This power, and its exercise, cannot be reconciled with a Congressionally-prescribed adjudicative role.

The manner in which the Board exercises its prosecutive function was described by former Board Chairman McCulloch:

> "The Board has delegated to the General Counsel the responsibility for screening the . . . requests for injunctive relief. He has the authority to reject those he regards as completely lacking in merit and refers the remainder to the Board with a detailed memorandum and a recommended course of action either for or against seeking injunctive relief. [*We form opinions as we study the facts alleged and set down in the memoranda. . . .*] Then follows discussion among the the five Board members, friendly, but often sharp; *and finally comes a decision which usually is unanimous* but not always, *and which usually follows the recommendation of the General Counsel,* but not always." (emphasis added).[9]

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[9] Address by Former Board Chairman Frank McCulloch, Eighth Annual Joint Industrial Relations Conference of Michigan State University, April 19, 1962. Reprinted in 29 L.R.R.M. 74, 83 (1962). In recent years, it appears General Counsel no longer submits cases to the Board in which he opposes seeking injunctive relief. See Siegel, *op. cit. supra* at 460 and n. 23, citing letter from Julius G. Serot, Assistant General Counsel, N.L.R.B., to author, February 19, 1971.

This procedure has caused one commentator to observe that "The discretion vested in the Board under section 10(j) resembles that of a public prosecutor." [10]

In light of the Taft-Hartley amendments, such prosecutive discretion may not be shared between Board members and General Counsel.

b. *Congress intended to limit the Board to the performance of quasi-judicial functions.*

The separation of prosecutive and adjudicatory powers between General Counsel and the Board, respectively, is apparent from a reading of the amended Act,[11] and its legislative history. Congress intended not only to shield the Board from prosecutive influences in its adjudications, L.M.R.A. §4(a), 29 U.S.C. §154(a),[12] but to prevent the Board from engaging in prosecutive functions. Congress stated:

> "The combination of the provisions dealing with the authority of the General Counsel, the provision abolishing the Board's review division, and the provisions relating to the trial examiners and their reports *effectively limit the Board to the performance of quasi-judicial functions.*" Conference Report to accompany H.R. Rep. No. 510, 80th Cong., 1st Sess. 37-38 (1947). (emphasis added).[13]

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[10] Note, "The 10(j) Labor Injunction: An Exercise In Statutory Construction," 42 WASH. L. REV. 1117, 1124 (1967) (footnote omitted).

[11] See, L.M.R.A. §3(a), (b), (d), 29 U.S.C. §153(a), (b), (d). General Counsel was given final authority, on behalf of the Board, "in respect of the prosecution of . . . complaints before the Board."

[12] Compare, Administrative Procedure Act, 80 Stat. 378, 5 U.S.C. §§551, 554(d) (1946).

[13] See, generally, Schwartz, An Introduction To American Administrative Law, 160-163 (2d ed. 1962). That Congress intended these quasi-judicial functions to be personally performed by Board members is clear. L.M.R.A. §4(a), 29 U.S.C. §154(a); *KFC National Management Corporation* v. *N.L.R.B.*, 497 F.2d 298 (2d Cir. 1974).

This was in conformity with the sponsors' intent. Representative Hartley commented:

> "Unlike the old Board, [the new Board] will not act as prosecutor, judge and jury. *Its sole function will be to decide cases.*" H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947); 1 *Legislative History* 297. (emphasis added).

See, *McLeod* v. *Business Machine And Office Appliance Mechanics Conference Board,* 300 F.2d 237, 242 (2d Cir. 1962); *International Ladies Garment Workers Union, Local 415-475* v. *N.L.R.B. (Arosa Knitting Corp.),* —— F.2d ——, 86 L.R.R.M. 2851, 2854 (D.C. Cir. 1974).

The Board's present §10(j) procedure, heretofore described, is violative of this Congressional intent.

2. The Board's §10(j) procedure permits it to consider ex parte, facts relating to issues on which it will ultimately have to pass in a quasi-judicial capacity.

Besides involving it in a prosecutive function, the Board's current §10(j) procedure is objectionable on another ground. It enables the Board to consider the facts of a case *ex parte,* and in advance of the time when due process would bring the case before the Board for decision.

The Act, and regulations promulgated thereunder, designed to insure fairness by providing for notice, an open evidentiary hearing followed by a meaningful opportunity to present argument and a decision by a disinterested arbiter, here are hopelessly compromised. As was recognized in the *Report of the United States Attorney General's Committee on Administrative Procedure,* 243 (1941), a major influence in the passage of the Administrative Procedure Act:

> *"If in deciding a case, a deciding officer goes outside the record and talks privately with prosecutors,* investigators, specialists, or others, *then in effect no*

> *hearing has been held* because the parties are not apprised of the additional views or facts presented and have no opportunity to offer countervailing proof or argument. *A secret conference of a few minutes destroys an entire trial.*" (emphasis added).

The Board's processes should be free of even the suggestion of impropriety. A litigant before the Agency is entitled to no less. Unfortunately, this fundamental axiom cannot be said to obtain under the current Board §10(j) authorization procedure. The role of the Board in authorizing §10(j) petitions violates the provisions of §§10(b), (c) and (d) of its own Act, as well as §§554 of the Administrative Procedure Act ("Adjudications"), with all their attendant procedural safeguards. The Board may not sit as "Judges of the Secret Court," denying respondents an opportunity to participate in deliberations at a formative and influential stage of the case. A procedure which permits this to happen must be changed.

B. The Pharmacy Was Prejudiced By The Board's Participation In The §10(j) Proceedings.

1. *By the Board's ex parte consideration.*

Here, the Board members went outside the record of the complaint case and "talked privately" with General Counsel in determining whether to authorize §10(j) proceedings. The Pharmacy does not know what facts were presented or what arguments were made by General Counsel, and, of course, it did not have an opportunity to respond to them. The danger is that these private talks may have influenced not only the §10(j) determination, which they were intended to influence, but the decision on the merits as well.[14]

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[14] The Board apparently authorized the General Counsel to seek a §10(j) injunction *after* the hearing before the Administrative Law Judge was concluded (125a). The injunction was sought on September 7. We do not know whether the Board had before it a copy of the record in the unfair labor practice case in

2. *By the Board's prosecutive involvement in an injunction proceeding.*

The problem is aggravated by the fact that the Board's detour from its statutory duties has taken it into the realm of prosecution. *The pre-existing influence of a prosecutive determination upon the adjudicative body and its members cannot be ignored. There is an inherent tendency to justify a preliminary determination with a subsequent holding on the merits.* As Justice Brennan wrote in *In re Larsen,* 17 N.J. Super. 564, 86 A. 2d 430, 435 (1952), our concern

> "springs from the fear that the agency official adjudicating upon private rights cannot wholly free himself from the influences toward partiality inherent in his identification with the investigative and prosecuting aspects of the case; in other words, that the atmosphere in which he must make his judgments is not conducive to the critical detachment toward the case expected of the judge. In a sense the combination of functions violates the ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause'."

By interjecting itself into the §10(j) proceeding, the Board adopted the prosecution of this case as its own; in rendering its Decision and Order in the complaint proceeding it judged its own cause. The end was easily foretold.

The fact that the Board's prosecutive prejudgment took place in the context of an injunction proceeding is cause for still further concern:

> "Because temporary injunctive relief is granted on the basis of an incomplete exposure to the facts in issue, there is an inevitable risk that it will inaccurately pre-

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authorizing General Counsel's §10(j) petition, or whether General Counsel relied upon it when he made his *ex parte* presentation to the Board. Nor do we know what factors the Board considered in authorizing the §10(j) injunction, for it has not published such standards. See, Siegel, *op. cit. supra,* at 461-463.

> vision the result of the final adjudication on the merits and perhaps irreparably injure the party whose actions were temporarily enjoined. Particularly when a temporary injunction is interposed in a labor dispute, 'the tentative truth [often] results in making [the] ultimate truth irrelevant'." [15]

This observation concerning the granting of an application for injunctive relief is equally applicable to the Board's procedure in the circumstances here. We think that the dangers and lack of fundamental fairness inherent in this procedure should be sufficient to deny enforcement to the Board's Order.

3. *The Pharmacy's position is supported by authority.*

The validity of the argument raised here is shown by the decision of the District Court in *Evans* v. *International Typographical Union,* 76 F. Supp. 881 (S.D. Ind. 1948), rendered shortly after the passage of the Taft-Hartley Act. There the Court approved the Board's former procedure whereby General Counsel was authorized to initiate and prosecute §10(j) proceedings *without* the Board's prior permission. See, "Statement of Delegation of Certain Powers of the National Labor Relations Board to the General Counsel," 13 Fed. Reg. 625, 29 C.F.R. §204.3 (a)(4) (1948).[16] This plenary delegation to General Counsel, the

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[15] Note, "Temporary Injunctive Relief Under Section 10(l) of the Taft-Hartley Act, 111 U. PA. L. REV. 460 (1963) (footnotes omitted), quoting from Frankfurter & Greene, *The Labor Injunction* at 80 (1930). See, 1 *Legislative History of the Labor Management Relations Act of 1947,* at 414; *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board, supra,* 300 F.2d at 242.

[16] "General Counsel shall exercise full and final responsibility, on behalf of the Board, for initiating and prosecuting injunction proceedings as provided for in Sections 10(j) and (l)." This regulation was consistent with Congress' purpose that:

> *"The General Counsel . . . have the final authority to act in the name of, but independently of any direction, control or*

(cont'd.)

Court suggested, was the *only* way in which §10(j) could be implemented without running afoul of the Congressional objectives of restricting the Board's function to adjudication and assuring litigants before the Board of a disinterested decision. Its warning is most pertinent here:

> "The consistency of such a delegation with the Congressional intent to sever the judicial functions of the agency from its prosecutive activities is emphasized when the authority to initiate interlocutory proceedings for temporary relief under Section 10(j) is more carefully considered. *If the Board itself were to petition the court for such temporary relief, not only would it be performing a function of a prosecutive nature, but also it would have considered ex parte, facts which relate to the very issues upon which the Board must ultimately pass in its quasi-judicial capacity. It is reasonable to assume that such prosecutive action and prejudgment on the part of the Board might tend to cast the shadow of partiality upon the further and principal proceedings before the Board.*" 76 F. Supp. at 889 (emphasis added).[17]

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review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and *in respect of the prosecution of such complaints before the Board.*" H.R. Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess. 37 (1947); 1 *Legislative History* 541. (emphasis added).

See n. 18, *infra* p. 16.

As reported in the *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, 90 (1949):

> "The court [in *Evans*] . . . observed that the Board's delegation, in its Rules and Regulations, to the regional directors of the power to seek interlocutory relief is in fact a delegation of such authority to the General Counsel by reason of the fact that the regional directors are under the supervision of the General Counsel." (footnote omitted).

[17] The decision in *Evans* was followed by the court in *Madden* v. *United Mine Workers*, 79 F. Supp. 616 (D.D.C. 1948).

Here, under its current §10(j) procedure, the Board has "itself . . . petition[ed] the court for . . . temporary relief . . . ," for it and not General Counsel has made the ultimate decision to seek such relief.[18] While General Counsel there-

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[18] In *Evans*, the respondent union sought to defend against a §10(j) petition on the ground that the statutory provision constituted an unlawful delegation of authority by Congress to the General Counsel. The court rejected this argument, finding that the delegation was to the Board rather than to General Counsel.

In this respect we do not believe the court was correct. As previously indicated, Congress in §3(d) of the amended Act gave General Counsel "final authority" not only over the investigation of charges and issuance of complaints, but "in respect of the prosecution of such complaints before the Board . . ." as well. Since a 10(j) application is an ancillary proceeding "in respect of the prosecution of [a complaint] before the Board," designed to protect the subject matter of the controversy pending final adjudication by the Board, it is likely that Congress intended General Counsel to exercise exclusive power in this area. See, *McLeod* v. *Local 239, Int'l Bhd. of Teamsters*, 330 F.2d 108, 110, (2d Cir. 1964).

The reference to "the Board" in §10(j) does not require a contrary conclusion. Congress used the same expression in §10(b), discussing the power to issue complaints. Under §3(d), the exercise of that power resides with General Counsel. As noted in *I.L.G.W.U., Local 415-475* v. *N.L.R.B., supra*, —— F.2d at ——, n. 24, 86 L.R.R.M. at 2855, n. 24:

> "The reference in Section 10(b) to the Board's power, actually to be exercised by the General Counsel pursuant to Section 3(d) with respect to the issuance and prosecution of complaints, was explained as follows:
>
> Mr. Hartley: *The reference to the Board was necessary because,* in order to have this man [General Counsel] independent of the Board, we had to use the term 'Board'. *Otherwise we would have had to set up a completely independent agency.* . . . He acts on behalf of the Board but completely independent of the Board. 1 *Legislative History* 833." (emphasis added).

• • •

Similarly, the legislative history of §10(j) suggests that the term, "the Board," as used in that section was intended to refer to the Agency as a whole and not to the judicial branch in particular. See, this Court's decision in *Danielson* v. *Joint Board of C.S. & A.G.W., I.L.G.W.U.*, 494 F.2d 1230, 85 L.R.R.M. 2902, 2910 (2d Cir. 1974), discussing the legislative history of §§10(j)

after "prosecute[d] on behalf of the Board, injunction proceedings pursuant to . . . Section 10(j) . . . ," 29 C.F.R. §202, he did not do so "independently of any direction, control or review by, the Board. . . . ," as Congress intended. 1 *Legislative History* 541. Therein lies the root of the problem in the case before this Court: the Board's prosecutive prejudgment in the §10(j) proceedings.[19]

4. *General Counsel should be required to seek §10(j) relief without Board authorization.*

The Board should not adhere to its current procedure. It should authorize General Counsel to initiate and prosecute §10(j) proceedings without the Board's prior approval, as it did before 1955. This procedure was held to be a lawful sub-delegation of power in *Evans, supra,* and did not involve the Board in a prosecutive function. As the Court there stated:

"The statute itself, as well as its legislative background, indicates that it was the purpose and policy of Con-

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and 10(l); see also, 29 C.F.R. §202. *Cf.* Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §§651 *et seq.,* providing for a complete separation of prosecutive and adjudicative functions in the Department of Labor and the Occupational Safety and Health Review Commission, respectively.

In any case, here the primary issue is not whether the Board has been delegated power under §10(j) in the first instance. The issue is whether, assuming it has been given that power, the Board is obliged to sub-delegate it to General Counsel so that the separation of agency powers ordained by the Act may be preserved, and a litigant's rights protected. This question should be answered in the affirmative.

[19] The Board has previously cited the decisions in *Sacks* v. *Angle,* 65 L.R.R.M. 2098, 2101 (D. Kan.) (not officially reported), *affirmed as modified,* 382 F.2d 655, 662 (10th Cir. 1967), as rejecting an argument similar to the one advanced here. A reading of these decisions, however, fails to reveal such rejection or any rationale therefor. In any event, these decisions were rendered in the context of §10(j) proceedings. The Board had not yet acted on the underlying unfair labor practice complaint when the issue was raised and the courts may not have been satisfied that there was an adequate showing of prejudice *vis-a-vis* the §10(j) proceedings. The facts are otherwise here.

> gress to separate the judicial functions of the Board from any prosecutive or investigative functions. • • • . . . [The] delegation of its functions which are of a more prosecutive than judicial nature is in harmony with this design." 76 F. Supp. at 889.[20]

C. Conclusion.

The fears articulated in *Evans, supra,* have been realized here. Although the Board professes "it is our practice not to pre-judge factual situations which have not yet come before us," *General Dynamics Corporation, Pomona Division,* 184 N.L.R.B. No. 71, 74 L.R.R.M. 1522, 1523 (1970), the Board does just that in cases where it authorizes §10(j) proceedings. Its active participation in §10(j) proceedings has cast the "shadow of partiality" on its Order in this case.[21] This Court should not place it imprimatur on such a procedure by enforcing that Order.[22]

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[20] We do not think it advisable for the Board's regional directors to be delegated this authority, as appears to have been the case under the former procedure, see n. 16, *supra.* General Counsel's personal review of cases where a §10(j) injunction is recommended, with the assistance of his Washington, D.C., staff, *see,* 29 C.F.R. §202.1.2, is desirable. This would tend to limit the petitions filed in the district courts to appropriate cases. *See, McLeod* v. *General Electric Co.,* 366 F.2d 847 (2d Cir.), *vacated as moot,* 385 U.S. 533 (1967).

[21] While unnecessary to decision here, we do observe that actual proof that the Board's §10(j) consideration has influenced its decision on the merits is difficult, if not impossible, to obtain. The Board does not disclose its internal operations in meaningful detail. See *KFC National Management Corporation* v. *N.L.R.B., supra,* 497 F.2d at ——, 86 L.R.R.M. at 2273; *Fusco* v. *Richard W. Kaase Baking Co.,* 205 F. Supp. 465 (N.D. Ohio 1962), at 474; *cf. Boire* v. *Pilot Freight Carriers, Inc.,* —— F. Supp. ——, 86 L.R.R.M. 2462 (M.D. Fla., No. 74-262-Civ. T-H, decided May 24, 1974); 29 C.F.R. §102.118.

[22] The Board may argue that this Court should not consider the foregoing argument because it was not raised below, relying upon L.M.R.A. §10(e), 29 U.S.C. §160(e). That section provides, however, that "the failure or neglect to urge [an] objection shall be excused because of extraordinary circumstances." Extraordinary circumstances are present here. *(Cont'd.)*

POINT II

The Board's Finding That the Pharmacy Unlawfully Refused to Bargain Resulted From an Erroneous Preclusion of Evidence Relevant to the Pharmacy's Defense That the Union in Fact no Longer Enjoyed Majority Support.

The Board's bargaining order was based on two subsidiary determinations: first, its affirmance of the Administrative Law Judge's finding that the Pharmacy had failed to adduce evidence that a majority of the employees did not want the Guild to continue to represent them (117a, 87a); and, second, its conclusion that the Pharmacy had no reasonable basis for doubting the Union's continued major-

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The Pharmacy could not raise this objection before the Board. There was no opportunity to do so. At the time the case was before the Administrative Law Judge, the Board had not yet acted on General Counsel's request for authorization. In any event, objections relating to the §10(j) proceeding were not cognizable in the unfair labor practice trial. See 29 C.F.R. §102.35. The Judge had no authority to dismiss the Complaint because of asserted irregularities in Board procedures, procedures which had not yet come into play, and whose prejudicial impact at the time were only speculative.

The Pharmacy was in no better a position before the Board. The §10(j) proceedings not having been a part of the record before the Administrative Law Judge, the Pharmacy could not except to an occurrence therein. See, 29 C.F.R. §§102.45(b), 102.46(h). Any objection was therefore deemed to have been waived. 29 C.F.R. §102.46(b). Moreover, prejudice did not become manifest until the Board itself decided the §8(a)(5) case adversely to the Pharmacy. By then it was too late to object.

In these circumstances, the Pharmacy should be permitted to argue, and this Court should consider, that the Board's decision in the unfair labor practice case was tainted. See, *N.L.R.B.* v. *Lundy Mfg. Corp.*, 286 F. 2d 424, 426 (2d Cir. 1960); *N.L.R.B.* v. *Richards*, 265 F.2d 855, 862 (3d Cir. 1959). Moreover, such a result is justified "because the Board has patently travelled outside the orbit of its authority" in its participation in the §10(j) proceedings. *Cf. N.L.R.B.* v. *International Union of Operating Engineers, Local 66 (West Penn Power Co.)*, 357 F.2d 841, 843 (3d Cir. 1966). Finally, this objection should be considered by the court in view of its importance to the administration of the Act.

ity status at the time it refused to bargain with the Union (118a).

Since neither subsidiary determination was justified, the Board's §8(a)(5) finding and bargaining order were improper.

A. The Board Has Held That Either An Actual Loss Of Majority Or A Reasonably Based Doubt Thereof May Justify A Refusal To Bargain.

In *Terrell Machine Co.*, 173 N.L.R.B. 1480, *enforced*, 427 F.2d 1088 (4th Cir.) *cert. denied*, 398 U.S. 929 (1970), the Board stated:

> "It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. * * * [This presumption] may be rebutted if the employer affirmatively establishes *either* (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status, *or* (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status." 173 N.L.R.B. at 1480-1481 (emphasis added). (Footnote omitted).

These principles, which had their origin in *Celanese Corporation of America*, 95 N.L.R.B. 664, 671-673 (1951), and were evolved in *Laystrom Manufacturing Co.*, 151 N.L.R.B. 1482, *enforcement denied*, 359 F.2d 799 (7th Cir. 1966), and *United States Gypsum Company*, 157 N.L.R.B. 652 (1966), have been cited repeatedly by both the Board[23] and the courts.[24]

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[23] See, e.g., *Orion Corporation*, 210 N.L.R.B. No. 71, 86 L.R.R.M. 1193, 1194 (1974); *Harpeth Steel, Inc.*, 208 N.L.R.B. No. 84, 85 L.R.R.M. 1174 (1974); *King Radio Corporation*, 208 N.L.R.B. No. 82, 85 L.R.R.M. 1118, 1123 (1974); *Automated Business Systems*, 205 N.L.R.B. No. 35, 84 L.R.R.M. 1042, 1045-1046, *enforcement denied*, 497 F.2d 262 (6th Cir. 1974).

[24] See, e.g., *The National Cash Register Company* v. *N.L.R.B.* 494 F.2d 189, 193-194, 85 L.R.R.M. 2657, 2660 (8th Cir. 1974); (cont'd.)

In the instant matter, the Pharmacy sought to rely on both defenses afforded by *Terrell*. Its experience involving the former is discussed below. (We shall treat the defense of the Pharmacy's reasonably grounded good faith doubt in Point III, *infra*.)

B. The Pharmacy Was Wrongfully Precluded From Establishing Its Defense Of No Majority In Fact.

In *Terrell, supra*, the Board noted that:

> " 'Majority representative status' means that a majority of employees in the unit wish to have the union as their representative for collective bargaining purposes." 173 N.L.R.B. at 1481, n. 3.

The Board described such employees as "union supporters," that is, those who "favor union bargaining." *Id.* at 1481. Similarly, the Board has held that a *loss* of majority status must be established by "affirmative proof" and "competent evidence" that a majority of unit employees no longer wish to have the incumbent represent them. *Automated Business Systems, supra,* 84 L.R.R.M. at 1045, 1046, *Orion Corp., supra,* 86 L.R.R.M. at 1194.

1. *The Affirmative Defense.*

Accordingly, in its answer, the Pharmacy asserted as an affirmative defense to the §8(a)(5) allegation:

N.L.R.B. v. *Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973); *Ingress-Plastene, Inc.* v. *N.L.R.B.*, 430 F.2d 542, 546 (7th Cir. 1970); Cf. *N.L.R.B.* v. *Midtown Service Company, Inc.*, 425 F.2d 665, 668 (2d Cir. 1970); *N.L.R.B.* v. *Frank Gallaro & Joseph Gallaro, d/b/a Gallaro Bros.*, 419 F.2d 97, 100 (2d Cir. 1969); *N.L.R.B.* v. *Master Touch Dental Laboratories, Inc.*, 405 F.2d 80, 82-83 (2d Cir. 1968); *N.L.R.B.* v. *Superior Fireproof Door & Sash Co.*, 289 F.2d 446, *rehearing denied*, 289 F.2d 713 (2d Cir. 1961).

The rule permitting an employer to challenge a union's majority status in fact is based upon the majority concept in the Act §9(a). An employer *may not* enter into a contract with a minority union. *International Ladies' Garment Workers Union* v. *N.L.R.B. (Bernhard-Altmann Texas Corp.)* 366 U.S. 731, 738-739 (1961).

"... the Guild did not continue to have the support of a majority of Respondent's registered and/or graduate pharmacists on, about, or after April 19, 1973." (13a)

It was therefore entitled to adduce evidence in support of this defense at trial. The Pharmacy sought to do this in two ways: by calling unit employees to testify; and, by subpoenaing documentary evidence relevant to the issue of Guild support. Neither effort succeeded.

2. *The exclusion of testimony and rejection of the offer of proof.*

At the hearing, Pharmacy counsel sought to call pharmacists to testify that they did not support the Guild on the date of the refusal to bargain (387a). The Administrative Law Judge refused to permit such testimony. He ruled:

"*I will not permit you to ask* [*an employee witness*] *whether he was a member of the Union as of April 19th, 18th or 17th* ... [T]o ask a witness, without any information ... 'How did you feel about the Union prior to April 19th?,' *'Did you want the Union to represent you then?,'* an uncommunicated state of mind, I would sustain objections to all those questions." (388a, 389a-390a). (emphasis added).

Pharmacy counsel thereupon offered to prove:

"... that if these people were called the majority ... would testify ... that on the 19th of April they did not support the Union and they were not members of the Union." (391a).

This offer of proof was rejected (391a).[25]

[25] The Administrative Law Judge offered to permit employee testimony only to corroborate testimony of Pharmacy management, which had been offered on the defense of a reasonably grounded good faith doubt (390a). See Point III, *infra*. Since Pharmacy counsel deemed such corroboration unnecessary, the offer was declined (391a).

The Judge's rulings were wrong. There could have been no more competent evidence of employee sentiment than the testimony of the employees themselves. Yet, the Judge would not allow this affirmative proof. Thus, by affirming this ruling (117a), the Board denied the Pharmacy the right to establish its defense of lack of majority by the best evidence.

3. *The attempt to subpoena documentary evidence of union membership and support was thwarted.*

The Pharmacy also caused to be issued a pre-trial subpoena *duces tecum* for the production of:

> "All books, records, documents, papers and other evidences of membership by employees of Retired Persons Pharmacy in said Metropolitan Guild of Pharmacists for the years 1971-1973," and;
>
> "All . . . [written] evidences . . . of initiation fee and dues payments from employees of Retired Persons Pharmacy . . . for the years 1971-1973. . . ." (59a-65a).

By petition dated August 14, counsel for the Guild, joined by General Counsel, sought to revoke the subpoena (69a).

The Judge ruled:

> "I rule on the basis of point 4 in the motion to quash,[26] . . . that the matter requested is irrelevant and I hereby quash the subpoena." (327a).[27]

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[26] Point 4 of the Guild's petition to revoke the subpoena stated: "The material sought is not relevant to the Employer's asserted defenses. The Employer refused to bargain on April 19, 1973, and at that time had no access to the Guild's records which it now subpoenas. Its defense to the Complaint must be premised on objective evidence available to it and in its knowledge on that date and it should not now be permitted to engage in a fishing expedition into the Guild's files." (69a).

[27] This ruling was affirmed by the Board (117a). It was not discussed in the Judge's decision.

This ruling constituted prejudicial error. At issue was whether or not a majority of employees continued to support the Guild on the date of the refusal to bargain. Membership is evidence of support; lack of membership is evidence of lack of support. Dues payments are also indicative of support.[28] Thus, the documents sought were clearly relevant. Since the *fact* of majority was in issue, employer knowledge of Guild membership or financial support on the date of refusal was irrelevant.

The Sixth Circuit recently considered a similar issue in *Automated Business Systems* v. *N.L.R.B., supra,* p. 27, n. 23. There, an employer was also faced with a refusal to bargain charge by an incumbent union. As part of its effort to establish that the union had ceased to be a majority representative when it refused to bargain, the employer sought to prove the number of "cards" filed in support of a decertification petition by his employees. The employer did not learn that the petition was allegedly supported by a majority until weeks after it had refused to bargain. The Administrative Law Judge refused to compel the regional director to produce the cards or supply a count of them. The Board affirmed. 205 N.L.R.B. No. 35, 84 L.R.R.M. at 1047. Reversing, the Sixth Circuit stated:

> "The Board would not permit the company to introduce evidence regarding the number of cards filed in support of the decertification petition. *Thus, the Board placed the burden of proof on the employer and then denies it the means of meeting its burden. We cannot accept this procedure.*" 497 F.2d at ——, 86 L.R.R.M. at 2666 (footnote omitted). (emphasis added).

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[28] *See, N.L.R.B.* v. *Tragniew, Inc.*, 470 F.2d 669, 674 (9th Cir. 1972). *Ingress-Plastine, Inc.* v. *N.L.R.B., supra,* 430 F.2d at 546; *Lodges 1746 & 743, I.A.M.A.W.* v. *N.L.R.B.*, 416 F.2d 809, 812 (D.C. Cir.) *cert. denied* 396 U.S. 1058 (1969). Here, the collective bargaining agreement had contained a maintenance of membership clause (33a).

Similarly, here, the Board placed the burden of proof on the Pharmacy to affirmatively establish that the Guild did not in fact enjoy majority support.[29] But when the Pharmacy sought to prove this by the best evidence available, employees' testimony, or by secondary evidence, membership records and financial support, the Board denied it the means of meeting its burden.

C. Conclusion.

The Board's Order should be denied enforcement. A refusal to permit the introduction of material, competent evidence in a Board proceeding constitutes a denial of due process. *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F.2d 215, 224 (8th Cir. 1941); *N.L.R.B.* v. *Burns*, 207 F.2d 434 (8th Cir. 1953).

Since a presumption of continued majority status "is something less than actual proof," *Automated Business Systems, supra*, 84 L.R.R.M. at 1049 (Chairman Miller, dissenting in part), to set it up as a bulwark against the introduction of actual proof—as was done here—is plainly improper. What the Board has done is to convert this rebuttable presumption (the only true kind) into an irrebutable one, i.e. a rule of substantive law. The Supreme Court's observation in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632, 6 F.E.P. Cases 1253, 1258 (1974), a civil rights case, is pertinent:

> "As the Court note last term in *Vlandis* v. *Kline*, 412 U.S. 441, 446, 'permanent irrebuttable presumptions have long been disfavored under the Due Process clauses of the Fifth and Fourteenth Amendments.' "[30]

The Board's irrebuttable presumption should not be favored here by enforcing its Order.

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[29] See cases cited in n. 23, *supra*. p. 20.

[30] See also, *N.L.R.B.* v. *Gallaro Bros., supra*, 419 F.2d at 100; *N.L.R.B.* v. *Tragniew, Inc., supra*, 470 F.2d at 674.

POINT III

General Counsel Failed in His Obligation to Prove the Union's Majority Status Upon the Pharmacy's Showing That Its Refusal to Bargain Was Based Upon a Reasonably Grounded Good Faith Doubt of Continued Majority Status.

The Administrative Law Judge, with Board affirmance, concluded that the Pharmacy did not have a reasonably grounded good-faith doubt of the Guild's loss of majority status (79a, 117a).

This finding was incorrect. The testimony relating to this issue, described below, was sufficient under applicable law to rebut the presumption of continued majority support and shift the burden of going forward to General Counsel. It thereupon became incumbent upon him to prove actual majority support for the Guild on the critical date. As stated in *Automated Business Systems* v. *N.L.R.B., supra,* F.2d at ——, 86 L.R.R.M. at 2665:

> "We find that once sufficient evidence has been presented to *cast a doubt* on the continued majority status, the burden shifts to the General Counsel to prove that, on the critical date, the union in fact represented a majority of the employees. *Lodges 1764 and 743* [*Int'l. Assn. of Machinists & Aero. Wkrs.*, 416 F.2d 809,] at 812 [D.C. Cir. (1969), *cert. denied,* 396 U.S. 1058 (1970)]; *Allied Industrial Wkrs. Local 289* v. *N.L.R.B.*, 476 F.2d 868 (D.C. Cir. 1973).

General Counsel's failure to adduce proof of the Guild's actual majority makes the Board's bargaining order unenforceable.[30a]

[30a] We have cited the holding in *Automated Business Systems* because the Pharmacy's refusal to bargain was followed by a unilateral change in working conditions, which was also alleged as a violation of the Act. In such circumstances, an inquiry into actual majority status was relevant. See Point IV, *infra.* While (cont'd.)

A. Testimony Relating To Conversations With Fourteen Pharmacists Provided Sufficient Basis To Justify A Doubt Of The Guild's Continued Majority Status.

Pharmacy Managers Brault and Altmann testified that based upon conversations they had with fifty percent of the pharmacists in the unit (14 out of 28) they did not believe the Guild represented a majority (249a-260a, 301a-318a).

The Administrative Law Judge, however, with Board affirmance, concluded the Pharmacy did not act in good faith when it withdrew from bargaining. He based this finding on *his* evaluation of testimony concerning management conversations with six (6) employees, assuming that conversations with eight other employees furnished a sufficient basis.[31]

This conclusion is not supported by substantial evidence. An examination of Brault's and Altmann's testimony concerning conversations they had with the six employees referred to[32] clearly justified Altmann's belief that "the Guild

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the Pharmacy was precluded from establishing a lack of continued union majority, General Counsel nevertheless had an independent duty to establish actual majority status upon the Pharmacy's showing of a reasonably grounded good-faith doubt. (In the absence of such circumstances, the rule stated in *N.L.R.B.* v. *Dayton Motels, Inc., supra* p. 27 at n. 24, that "[a] good-fath doubt exculpates the employer even if the Union in fact represented a majority of the employees," would be applicable. See the Board majority opinion in *Automated Business Systems, supra* 84 L.R.R.M. at 1045-1047. *But see*, Member Kennedy's concurring opinion in *Sambo's Restaurants, Inc.*, 212 N.L.R.B. No. 120 (1974), slip opinion at 6-7).

[31] Thus, he stated:

"I find . . . that Respondent did not in good faith believe that the Guild had lost its majority even if the other 8 employees in the unit of 28 who talked to Brault had withdrawn their support from the Guild and clearly stated such to Respondent's officials." (79a) (footnote omitted).

[32] Campbell, Johnson, Lewis, Testamark, Goldman and Wolf (78a-79a).

did not . . . have the majority support of the pharmacists" (259a-260a).[33]

1. ***Lena Campbell.***

Brault testified that Lena Campbell came to his office in early April and "was quite upset at what she termed was the treatment of Ms. Kim by the Guild people, which she objected to, quite strongly." (75a; 302a). At the trial, the Administrative Law Judge characterized this statement as indicating *"strong displeasure with the action of the Union towards a fellow employee."* (302a). The Judge, however, was unwilling to find this statement as evidencing a loss of union support.

We disagree. We think it was enough to justify Altmann's doubt concerning Campbell's continued Guild allegiance, when considered in context with Brault's earlier conversations with Kim. Brault testified that on a number of occasions Kim told him that "the Guild people" were harassing her to slow down in her work and to join the union (310a-311a). This, of course, is what Campbell was objecting to. To Brault, it conveyed an antipathy toward the Guild, one reasonable in the circumstances.

2. ***Benjamin Goldman.***

Brault testified that he recalled a conversation prior to April 19 with Benjamin Goldman in which Goldman told him "that he didn't have any use for them [the Guild]." (76a; 308a-309a).

The Judge refused to consider this conversation as evidence of lack of support because of "Brault's qualification of the response as being 'basically' what the employee stated." (79a).[34] The import of Goldman's statement was

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[33] Of the six conversations, Brault had five and Altmann one. Brault related his conversations to Altmann, including those conversations not discussed by the Judge (75a; 258a-259a).

[34] Brault testified: "[Goldman] replied that he didn't have any use for them. These are basically his words." (309a).

clear; Brault was not recording responses to his inquiries; he could not be expected to remember conversations verbatim months afterwards; and, General Counsel produced no evidence to the contrary, either on cross-examination of Brault or by calling Goldman himself. Goldman's remarks clearly evidenced lack of support. The Judge's refusal to consider them as such was wrong.

3. *Paul Johnson.*

In early 1973, Johnson had a conversation with Altmann about recommendations for the operation of the Pharmacy. Altmann advised Johnson that the recommendations would have to be discussed with the Guild (251a). Johnson commented that Altmann *"should spend more time trying to get rid of the Guild than trying to pacify the Guild."* (75a; 251a-252a).

The Administrative Law Judge concluded that the employee's remarks did not establish a lack of support for the Guild, finding "[no] clear indication that the speaker did not want to be represented by the Guild" (78a). This finding was erroneous. An employee does not urge his employer "to get rid of" a union which he supports.[35]

4. *Connie Lewis.*

Manager Brault recalled a conversation with Connie Lewis prior to April 19, during which she told Brault "that she didn't bother with the Guild at all" (76a; 313a-314a).

The Administrative Law Judge concluded that this statement did not "rise to the level of evidence which would reasonably support a belief that [she] did not desire Guild representation." (78a). We do not agree. To "not bother with the Guild" is, to the average layman, not to support it.

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[35] It does not appear that the Administrative Law Judge even considered Johnson's conversation with Altmann in arriving at his conclusion (78a).

5. *Beverly Testamark.*

Brault testified that he had a conversation with Testamark in early 1973 in which she told him that "she had no time for the Guild" (76a; 315a).

The Administrative Law Judge discounted it as an equivocal statement (78a-79a). We disagree. As a colloqualism, "no time" is synonymous with "not supporting."

6. *Alfred Wolf.*

Alfred Wolf had three or four conversations with Brault about the Guild prior to April 19:

> ". . . Mr. Wolf would complain fairly frequently about the noise and the meetings, the gatherings that were going on . . . (that) he attributed to the Guild people." (317a-318a).

The Judge believed that Wolf's remarks did not show "that Wolf did not want the Guild to represent him for the purpose of collective bargaining." (79a). We think this objection is unfounded. Wolf, by objecting to the activity of the Guild, was evidencing antipathy towards it.[36]

B. The Pharmacy Was Not Required To Adduce Evidence Of No Majority-In-Fact To Prove A Reasonably Grounded Doubt.

In establishing a defense of a reasonably grounded good faith doubt, an employer need not prove an actual loss of majority. A lesser degree of proof is required. All that must be shown is "enough to justify a doubt," as the Board

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[36] The Judge also concluded that the testimony was not probative because Brault was unable to fix the time of these conversations (79a). The record shows, however, that Brault testified they occurred prior to the election, after the election, and during the contract term (May, 1972-May, 1973) (317a). Greater specificity was not required. Brault could not be expected to recall the precise date, time and location of each conversation; he was not carrying with him a notebook in which to jot down the time and place of each conversation.

stated in *Automated, supra,* 84 L.R.R.M. at 1045, or "sufficient evidence to cast a doubt," as the court wrote in that case, 497 F.2d at ——, 86 L.R.R.M. at 2665.

This is consistent with the great weight of authority. In *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 104 (1954), the Supreme Court stated that an employer may refuse to bargain with an incumbent union, after the anniversary of certification, "if he has fair doubts about the union's continuing majority. . . ." Interpreting this statement in *N.L.R.B.* v. *John S. Swift Co.*, 302 F.2d 342, 346 (7th Cir. 1962), the Seventh Circuit wrote, "To be 'fair' a doubt must have a rational basis in fact." The requirement of rational basis in fact, sometimes described as a "reasonable basis," *N.L.R.B.* v. *Midtown Service Co., supra,* 425 F.2d at 668; *Lodges 1746 & 743, I.A.M.A.W.* v. *N.L.R.B.*, 416 F.2d 809, 812 (D.C. Cir.), *cert. denied,* 396 U.S. 1058 (1969), is by now well-established. See, e.g., *N.L.R.B.* v. *Frick Co.*, 423 F.2d 1327, 1330-1331 (3d Cir. 1970); *N.L.R.B.* v. *Rish Equipment Co.*, 407 F.2d 1098, 1101 (4th Cir. 1969); *N.L.R.B.* v. *Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966). It is the same as the "reasonably grounded doubt" criterion of *Terrell, supra.*[37]

In none of these cases, however, has it been held that the evidence necessary to support a doubt is the equivalent of evidence necessary to establish that the union in fact no longer represents a majority. Neither logic nor law would warrant such a holding, and the dual defenses of *Terrell* would become redundant.

Here, the Administrative Law Judge was preoccupied with whether a numerical majority of unit employees had conversations with management representatives in which

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[37] The courts have generally approached the issue on a case-by-case basis, considering all circumstances in their totality. *N.L.R.B.* v. *Gallaro Bros., supra,* 419 F.2d at 102; *The National Cash Register Co.* v. *N.L.R.B., supra,* 494 F.2d at 193-194, 85 L.R.R.M. at 2660; *Ingress-Plastene, Inc.* v. *N.L.R.B., supra,* 430 F.2d at 547-548 (7th Cir. 1970).

they expressed anti-union sentiment. This approach misconstrues the "reasonably grounded doubt" criterion of *Terrell, supra.* The fact that a large number of employees expressed sentiments hostile to the Guild was sufficient to "justify a doubt" of majority status. For the meaning of doubt is uncertainty, and a tattoo of criticism, rejection and uninterest by a sizable portion of the employee complement would reasonably destroy in the mind of the listener the certainty of majority support.[38]

In view of this background, the Pharmacy was possessed of evidence "enough to justify a doubt".[39] The employees' remarks provided ample justification for dispelling certainty as to the Union's continued majority status. There was no warrant for the Administrative Law Judge to require a showing that 50% plus one of the unit employees made unequivocal statements rejecting any representation whatsoever by the Guild in order for the Pharmacy to establish its reasonably grounded doubt. *A determination*

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[38] This would be true even if the number fell considerably short of an absolute majority and the employees' criticism was directed to a particular manifestation of union representation, rather than to its conduct in general.

[39] The issue is akin to that posed by the filing of a properly supported petition to decertify a union. The Board has held that the mere filing of an employee decertification ("RD") petition—which need only be supported by a 30% "showing of interest"—is sufficient to raise a "question concerning representation" and require an employer to cease bargaining with an incumbent union. *Telautograph Corp.*, 199 N.L.R.B. No. 117, 81 L.R.R.M. 1337 (1972). In cases of employer ("RM") petitions, the counterpart to a 30% "showing of interest" is a demonstration "by objective considerations" that the employer has "some reasonable grounds for believing that the union has lost its majority. . . ." *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966). This requirement, in turn, is indistinguishable from the "reasonably grounded doubt" requirement in complaint cases. See, *George Braun Packing Co.*, 210 N.L.R.B. No. 146, 86 L.R.R.M. 1387 (1974). Since the 30% showing of interest by employees is not intended to be dispositive of the issue of majority status, neither should the showing of a reasonably grounded doubt. It need only be sufficient to raise the issue.

of actual status should have awaited General Counsel's introduction of evidence of majority support, upon the shifting of the burden to him.[39a]

C. The Pharmacy's Challenge Was Raised In The Context Of Good Faith.

The Board has stated that an employer's doubt of a union's majority status should arise in circumstances evidencing good faith. *Terrell, supra.* Such circumstances exist here. No anti-union motivation has been shown by the commission of other employer unfair labor practices.[40] The Pharmacy's good-faith is further shown by the "harmonious and friendly relationship" which it enjoyed with its employees and the Guild,[41] *N.L.R.B.* v. *Laystrom Mfg.*

[39a] "The courts of appeals continue to tell us that if an employer offers evidence which casts serious doubt that the incumbent union commands the support of a majority of employees the burden shifts to the General Counsel to come forward with the evidence that the union in fact did represent a majority of the employees." *Sambo's Restaurants, Inc.*, 212 N.L.R.B. No. 120 (1974) Member Kennedy, concurring (Slip opinion at 6-7) (Citations omitted).

[40] "[T]here was no evidence that the employer had instigated, encouraged or influenced the employees' rejection of the union. . . ." *N.L.R.B.* v. *Gallaro Bros., supra,* 419 F.2d at ——, 73 L.R.R.M. at 2046. While it has been held that the commission of independent unfair labor practices may evidence bad faith, *Cf. N.L.R.B.* v. *Swift Co., supra; N.L.R.B.* v. *Rish Equipment Co., supra; Industrial Workers, Allied, Local 289* v. *N.L.R.B.*, 476 F.2d 868 (D.C. Cir. 1973), and the Board did find other unfair labor practices here, these findings involved conduct occurring *after* the refusal to bargain and directly related to the refusal itself. The interviewing of employees was conducted by the Pharmacy's attorneys in preparation for litigation. The unilateral change of hours was unlawful only if the refusal to bargain which preceded it was unlawful, and there is no evidence of anti-union motivation for the change (231a-233a, 275a-279a). Such post-refusal conduct therefore cannot be considered as evidencing bad faith. *National Cash Register Co. v. N.L.R.B., supra,* —— F.2d ——, ——, 86 L.R.R.M. 2822, 2825 (5th Cir. 1974); *N.L.R.B.* v. *Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972). *Ingress-Plastene, Inc.* v. *N.L.R.B., supra,* 430 F.2d at 548.

[41] See testimony of Guild attorney Lechner, quoted *infra* p. 53.

Co., 359 F.2d 799, 801 (7th Cir. 1966), and by the fact it sought to resolve its doubt as to the Guild's continuing majority status by means of a Board election.[42]

In all the circumstances, the Board should have found sufficient evidence to require General Counsel to undertake his burden of proving actual Guild majority. *Automated Business Systems* v. *N.L.R.B., supra,* 497 F.2d at ——, 86 L.R.R.M. at 2665.

POINT IV

The Board's Finding That the Pharmacy Unlawfully Refused to Bargain When It Unilaterally Changed Its Employees' Hours of Work Resulted From an Erroneous Preclusion of Evidence Relevant to the Pharmacy's Defense That the Union in Fact No Longer Enjoyed Majority Support.

The Administrative Law Judge found, with Board affirmance, that:

> "by changing the hours of unit employees from 42 hours[43] to 40 hours unilaterally and without notice to the Guild, Respondent also violated Section 8(a)(5) and (1) of the Act." (85a).

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[42] The Pharmacy's RM petition was dismissed solely because it was filed during the Board-devised "insulated period" prior to the expiration of the collective bargaining contract (74a; 51a). The filing of a petition is evidence of good faith. *Truck Drivers Union, Local 413* v. *N.L.R.B. (Summer & Co.)*, 487 F.2d 1099 (D.C. Cir. 1973). That the petition was dismissed as untimely does not negate the inference of good faith. See, *Ingress-Plastene, Inc.* v. *N.L.R.B.*, 430 F.2d 542 (7th Cir. 1970). The Regional Director could have held the petition in abeyance until the end of the insulated period, and so possibly have avoided this lengthly litigation, but he chose not to.

[43] Contrary to the Judge's finding, the hours were reduced from 42½ hours (30a), not 42 hours (85a).

This finding was based on the same preclusionary error which taints the Board's conclusion as to the Pharmacy's withdrawal from bargaining. See Point II, *supra.*

In *N.L.R.B.* v. *Superior Fireproof Door & Sash Co., supra,* 289 F.2d at 719, this Court approved the Board's rule that after the expiration of the certification year, an employer may not only question a union's continued majority status,

> "but may also change wages or conditions of employment, although he does the latter at his peril that his belief as to the loss of majority is not only reasonable but right, *Stoner Rubber Co.,* 123 N.L.R.B. 1440 (1959); *see also, National Carbon Division,* 105 N.L.R.B. 441 (1953); *American Laundry Machine Co.,* 107 N.L.R.B. 1574, 1583 (1954)."

See also, N.L.R.B. v. *Gallaro Brothers, supra,* 419 F.2d at 101.

In discussing this point in *Stoner Rubber Co.,* 123 N.L.R.B. 1440, 1445 (1959), the Board explained:

> ". . . [W]hen an employer not only refuses to bargain with the union, but also unilaterally changes working conditions, he in effect has unilaterally decided the question concerning representation against the union. In making such a decision the employer acts at his peril. If the union represents a majority of employees at the time the employer unilaterally changes working conditions, the employer violates Section 8(a)(5) by his conduct. *Conversely, if the Union does not represent a majority at that time, the employer is not guilty of a refusal to bargain.*" (emphasis added; footnote omitted).

The issue, then, is again one of majority-in-fact or lack of it. Here, however, the Judge refused to permit the employer to establish the Guild's lack of majority status. He would not allow the Pharmacy to call employees to

testify on this issue, and would not require the production of relevant documentary evidence. There was no way the Pharmacy could prove that its withdrawal from bargaining was "right," and its unilateral change of hours therefore lawful. *National Cash Register Co.* v. *N.L.R.B., supra,* 494 F.2d at 194, 85 L.R.R.M. at 2661.[44] The Board's finding based on this preclusion should not be sustained.

POINT V

The Board Erred in Finding That Pharmacy Counsel's Pretrial Interview of Unit Employees Was Unlawful.

The Administrative Law Judge, with Board affirmance, decided that the Pharmacy had violated §8(a)(1) of the Act "[b]y coercively interrogating employees" with respect to their union membership and activity or that of other employees (89a, 117a). This finding was based on counsel's interviewing of employees in preparation for the Pharmacy's defense to the unfair labor practice charge that it had unlawfully refused to bargain. The finding is not supported by the evidence or the law.

A major issue in this case was whether the Guild represented a majority of employees on April 19, 1973, that is, whether the Guild then had majority support. Pharmacy counsel's purpose in speaking to the employees was to prepare the Pharmacy's defense that the Guild did not in fact represent a majority on that date (143a, 341a). The questions asked the pharmacists (91a-93a) were in furtherance of this inquiry.

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[44] The Administrative Law Judge incorrectly stated that the decision to alter the pharmacists' hours was made "in early May, 1973, prior to the expiration of the collective bargaining contract" (74a). The decision in fact was made on May 29, and implemented after the expiration of the contract on May 30 (275a-277a, 291a).

The pharmacists suffered no reduction of pay because of the reduction in hours (192a, 283a).

The Administrative Law Judge, however, concluded that the Pharmacy had violated §8(a)(1) because *all* the questions "failed the test of relevancy" (83a). The *only* relevant question, in his view, was "'do you wish the [Guild] to represent you for purposes of collective bargaining?'" *(Ibid.)*.[45] The Board affirmed this *per se* violation finding (118a). It should not be sustained. No violation of §8(a)(1) has been established.

A. This Court Has Rejected A Per Se Approach In Determining Whether Interrogation Violates §8(a)(1).

Unlike the Board, this Court has adhered to a comprehensive approach, requiring an examination of the record as a whole, in deciding whether an employer's interrogation is violative of the Act. In *Bourne* v. *N.L.R.B.*, 332 F.2d 47, 48 (2d Cir. 1964), the Court stated:

> "Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards.
>
> • • •
>
> These include:
>
> (1) The background, i.e., is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
>
> (5) Truthfulness of the reply."

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[45] But compare his trial ruling, *supra*, p. 22, *"I will not permit you to ask [an employee] . . . 'Did you want the Union to represent you?'"*

Pharmacy counsel's conduct was not unlawful. Their questioning of employees was not threatening; and did not meet the "severe standards" set by this Court for engaging in an unfair labor practice.

B. Counsel's Interviewing Was Not Threatening.

The threshold problem in applying *Bourne* is to ascertain that the interrogation is "not itself threatening." The issue is whether "the language of the questions propounded is not intimidating in itself," *N.L.R.B.* v. *Syracuse Color Press, Inc.*, 209 F.2d 596, 599 (2d Cir. 1954), and whether "the questioning is not accompanied by any explicit threats," *N.L.R.B.* v. *Firedoor Corporation of America*, 291 F.2d 328, 331-332 (2d Cir.), *cert. denied*, 368 U.S. 921 (1961).

Here, the questions themselves did not contain any threats (91a-93a), nor did the manner of questioning. The interviewing attorneys were polite at all times, even when certain pharmacists refused to answer any questions (321a, 339a, 371a). It is therefore necessary to examine Pharmacy counsel's conduct in light of the *Bourne* standards.

C. Counsel's Conduct Did Not Justify A Violation Finding Under The Bourne Criteria.

1. *The background.*

There was no history of employer hostility and discrimination with respect to unions in this case. Guild attorney Lechner's testimonial is dispositive:

> "It was clear, as we went along, that the relationship between the parties was excellent. * * * The relationships got better and better as the [expiring] contract progressed." (143a, 144a).

Accordingly, the Pharmacy's background does not warrant a §8(a)(1) finding. *Trico Products Corporation* v. *N.L.R.B.*, 489 F.2d 347, 352 (2d Cir. 1973); *N.L.R.B.* v. *M. H. Brown Co.*, 441 F.2d 839, 841, 77 L.R.R.M. 2217,

2219 (2d Cir. 1971); *N.L.R.B.* v. *General Stencils, Inc.*, 438 F.2d 894, 899 (2d Cir. 1971); *N.L.R.B.* v. *Dorn's Transportation Company*, 405 F.2d 706, 712-714 (2d Cir. 1969); *N.L.R.B.* v. *D'Armigene, Inc.*, 353 F.2d 406, 411-413 (2d Cir. 1965); *N.L.R.B.* v. *Lorben Corporation*, 345 F.2d 346, 347-348 (2d Cir. 1965). The evidence demonstrates only a "calm labor environment" and a "noticeable absence of the sort of anti-union animus which seems generally to underlie disputes of this kind." *N.L.R.B.* v. *Anvil Products, Inc.*, 496 F.2d 94, 86 L.R.R.M. 2822, 2825, and n. 6 (5th Cir. 1974).

2. *The nature of the information sought.*

The Pharmacy attorneys did not appear to be seeking information on which to base *taking action against individual employees.* The preliminary statement read to all employees was sufficient to dispel any notion to the contrary:

> "I assure you that anything you tell me will not affect your job in any way, under any circumstances. . . ." (91a).[46]

Moreover, a thorough examination of the questions asked would not yield any information reasonably viewed on which the Pharmacy could "take action." [47] Where a certified representative is involved, as here, questions concerning knowledge of the administration of the union and its finances would not reasonably suggest to employees that

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[46] *Cf. N.L.R.B.* v. *Lorben Corporation, supra*, 345 F.2d at 349-350 (Friendly, C.J., dissenting).

[47] The only question which might have proved threatening under these circumstances and which the Administrative Law Judge held would have been proper—"Do you wish the Guild to continue to represent you?"—was not asked. This question more than any other would have required the employee respondent to commit himself on the question of union preference, with the attendant perceived threat of reprisal.

the Pharmacy was focusing its sights on any individuals.[48] The manner in which the interviewing was conducted, discussed *infra*, subd. 4, only strengthens this conclusion.

3. *The identity of the questioners.*

The attorneys who interviewed the pharmacists were not part of the Pharmacy's supervisory hierarchy. There is no evidence that any of the pharmacists regarded them as such. Although the pharmacists did have reason to believe they acted with the authorization of management, it was also evident that these strangers' interest and conduct were purely professional.[49] Their identity would not indicate that the questioning discouraged union membership. *N.L.R.B.* v. *Dorn's Transportation Co., supra,* 405 F.2d at 714, 70 L.R.R.M. at 2300.

4. *The places and manner of interrogation.*

The areas chosen for the interviews were specifically selected for their non-coercive atmosphere (196a, 336a-337a). They included the library, the accounts receivable office, and the secretarial office on the first floor of the Pharmacy, all places frequented by unit employees (337a). While these locations were away from the employees' immediate work area,[50] there were no other satisfactory places to hold these interviews. *See, N.L.R.B.* v. *M. H. Brown Co., supra,* 441 F. 2d at 841, 77 L.R.R.M. at 2219.

The prepared introductory statement which was read to the pharmacists (91a), as well as the oral advice of the

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[48] There were no allegations of discriminatory conduct or violations of §8(a)(3). Nor were any charges made that the Pharmacy had otherwise violated §8(a)(1). "[I]nquiries . . . concerning what was being done in behalf of the union" are not *per se* illegal. *N.L.R.B.* v. *Montgomery Ward & Co.,* 192 F.2d 160, 163-164 (2d Cir.), *cert. denied,* 355 U.S. 829 (1952). Nor are those involving an employee's union membership. *N.L.R.B.* v. *Firedoor Corporation of America, supra,* 291 F.2d at 331-332.

[49] The attorneys had not met any of the employees prior to the interviews (340a).

[50] The employees work together in a large room along a conveyor belt (236a).

attorneys that the interview's purpose was "to assist in the preparation of a defense to unfair labor practice charges filed by the Guild" (320a, 338a, 369a), a statement understood by the pharmacists (185a, 212a), made clear the questions' purpose.[51]

Likewise, the fact that employees were told and understood that their participation was entirely voluntary, and that they were free to leave without answering any questions at all—a right which General Counsel's witnesses Meszaros and Woods exercised—also fails to show a discriminatory appearance.[52]

The testimony of employee Meszaros provides an interesting insight as to the conduct of the interviews. He testified:

> "My curiosity was aroused and I was extremely interested in finding out whether these questions that I was told [about] by the other people that were being asked of them were true. So I asked Mr. Darby what the questions were. He proceeded to read about eight or ten of them and then he paused and looked at me and waited for a reply. I said, 'Go on.' He continued. He read probably three or four more questions, pausing between each one and looking at me, waiting for a reply. I didn't reply. He said, 'I guess we're not getting anywhere and you're not going to answer?' I said 'That's correct.'

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[51] The Judge concluded that the statement was insufficient to advise employees of the purpose of the interview (81a). The Judge was incorrect. Counsel need not have described the particulars of the charge against their client. *Robertshaw Controls Company*, 483 F.2d 762, 766 n. 6 (4th Cir. 1973); *Shop-Rite Foods, Inc.*, 205 N.L.R.B. No. 116, ALJD at 8, 84 L.R.R.M. 1122 (1973); *Metro Pants Mfg. Co.*, 185 N.L.R.B. 492, 497 (1970).

[52] Woods testified:

> "Mr. Darby indicated that he may ask me some questions; I may feel free to leave the room at any time; that he would appreciate my answers." (213a).

Attorney Darby testified that "when pharmacists came into the room, I tried to place them at their ease." (339a).

> He said something to the effect, 'It was nice meeting you' and 'Goodbye' * * *" (186a).[53]

This testimony fails to indicate any coercive impact. On the contrary, it portrays an employee in command of the situation. The testimony of employee Woods, whose account was similar (213a),—the only other employee called by General Counsel in support of this allegation—is also devoid of the suggestion of fear. This is not surprising. These employees were not involved in an initial organizing drive; they had lived under a collective bargaining contract with a union representative and an admittedly friendly employer. As stated in *Federation of Union Representatives* v. *N.L.R.B.*, 339 F.2d 126, 131, 57 L.R.R.M. 2547, 2551 (2d Cir. 1964):

> "The employees interrogated were not new to the concept of union organization and the right to be free from coercion. In this setting, we see no substantial evidence of threat or promise, express or implied."

5. *The truthfulness of the reply.*

"The 'truthfulness of the reply' test of *Bourne* . . . means that if the employee admits union affiliation there is little ground for holding that he was intimidated." *N.L.R.B.* v. *Master Touch Dental Laboratories, Inc., supra*, 405 F.2d at 84. Here, of the 27 employees interviewed, 11 refused to answer any questions (30a).[54] General Counsel did not adduce any evidence concerning the remaining 16. Therefore, the record is silent as to whether they admitted or denied union membership, and whether these responses were truthful or untruthful when made.[55]

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[53] Meszaros' testimony was corroborated by Pharmacy attorney Darby (340a).

[54] Apparently on advice of counsel. See attorney Lechner's testimony, *infra*, p. 43.

[55] The Administrative Law Judge's refusal to permit the Pharmacy to question employees about their support for the Guild (see Point II, *supra*) would preclude the Pharmacy's inquiry on this point.

The only testimony relevant to the subject of the truthfulness of replies was given by Guild attorney Lechner. He stated that on the morning of the interview he received a telephone call from then-Guild President David Leise advising him of the interviewing and seeking Lechner's advice (152a-153a).[56] Lechner related:

> "I told him to tell the employees to refuse to answer the questions and then I told him that if an employee was concerned about his refusal, was afraid to take that position, the employee should lie to the questioner and . . . disclaim any membership in the Guild, even though the employee was a member of the Guild." (74a; 153a).

The message was apparently given to Meszaros who then relayed it to other employees (181a-185a). Since Meszaros and Woods both chose not to answer any questions and could not testify as to the truthfulness of other employees who did answer, no conclusion may be drawn on this *Bourne* standard.[57]

Accordingly, under the *Bourne* standards no §8(a)(1) violation has been established. The employer's background, the nature of the information sought, the identity of the questioners, the place and method of interrogation, and the truthfulness of the replies (which is unascertainable), all fail to demonstrate a coercive effect.

D. Counsel Had A Legitimate Purpose For Conducting The Interviews.

Pharmacy counsel were "only and in good faith seeking information with which to prepare for a hearing on alleged

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[56] Meszaros said he had called Leise and asked him to contact Lechner (181a). Meszaros testified that he was a member of the Guild's Board of Directors at the time (176a).

[57] Even assuming that some answered untruthfully, it would be unreliable to gauge coercive impact by this fact in view of the recommendation that employees lie. Absent such advice we do not know what the employees' uninfluenced reaction would have been.

unfair labor practices," *cf. N.L.R.B.* v. *General Stencils, Inc., supra,* 438 F.2d at 898-899 n. 3.[58]

Attorney Darby testified:

"... the purpose of interviewing the pharmacists was in order to prepare a defense to the allegations in the charge." (341a).

Attorney Lewis testified:

"The interviews were solely conducted for the purpose of fair and adequate representation of a client by its counsel. The interviews were conducted only for the benefit of counsel. . . ."(381a).[59]

This is underscored by the fact that the completed questionnaires and their contents were kept confidential from the Pharmacy management (321a, 339a, 371a). *See, H. P. Wasson & Company,* 170 N.L.R.B. 293, 297, *enforcement denied,* 422 F.2d 558 (7th Cir. 1970).

Furthermore to defend against the charge counsel sought information for use in an unfair labor practice hearing. Had General Counsel called employees as witnesses to establish the Guild's majority status upon the shifting of the burden of going forward,[60] the information would have been critical in the search for truth on cross-examination.

The Board apparently recognizes the right of employers to inquire as to the ultimate issue of majority status, *provided a secret poll is used,*[61] *Struksnes Construction Company,* 165 N.L.R.B. 1062 (1967).[62]

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[58] The questions were not hastily conceived, but were the result of considerable thought and study by counsel (333a-335a, 368a-369a, 377a).

[59] See also, counsel's introductory statement (91a) and counsel's Motion For A Protective Order, etc. (14a-17a), and request to appeal from the denial thereof (23a-26a). No further interviewing was conducted after May 21 (345a, 347a-384a).

[60] See Point III, *supra,* p. 26.

[61] An anonymous conclusionary survey would be of little utility to an attorney preparing a defense to unfair labor practice charges, and contemplating direct and cross-examination of witnesses.

[62] Although the Administrative Law Judge in the instant matter relied, in part, on *Struksnes* to find a violation (85a), the Board (cont'd.)

The Board also permits attorney interviewing under certain circumstances. In *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 743 (D.C. Cir.), *cert. denied*, 341 U.S. 914 (1951), the Court stated:

> "[A]n employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value to justify the risk of intimidation which interrogation as to union matters necessarily entails. * * *" 185 F.2d at 743.

See also, *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 774-775, *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

Mindful of this rule, the Board has upheld Counsel's right "to search for supporting witnesses", *Clermont's Inc.*, 154 N.L.R.B. 1397, 1414 (1965), "to interview employees . . . for the purpose of preparing (his) case for trial", *May Department Stores Co.*, 70 N.L.R.B. 94, ——, *enforced*, 162 F.2d 247 (8th Cir.), *cert. denied*, 332 U.S. 808 (1947), to ascertain the facts of General Counsel's case and prepare for the impeachment of his witnesses, *Hilton Hotel Corporation*, 193 N.L.R.B. 197, 204, *enforced on other grounds*, 487 F.2d 1143 (D.C. Cir. 1972); *Walker's*, 159 N.L.R.B. 1159, 1178 (1966), and generally to "proceed freely with his pre-trial preparation so long as his investigation is concerned with the issues raised," *Lipman Bros.*, 147 N.L.R.B. 1342, 1369 (1969). Notwithstanding the principle of liberal "discovery" suggested by the above cases, the

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found it unnecessary to turn its decision on the lack of anonymity in counsel's questioning (118a). Cf. *N.L.R.B.* v. *Rubin*, 424 F.2d 748, 757 (2d Cir. 1970), leaving open the question of the "scope and force" of the *Struksnes* rules, since a violation under *Bourne* was established.

The Board's supplemental decision in *Struksnes* resulted from a remand by the District of Columbia Circuit, 353 F.2d 852, 60 L.R.R.M. 2353 (1965), in which that Court refused to enforce the Board's original order, 148 N.L.R.B. 1368 (1964). The District of Columbia Circuit cited the Board's decision in *Lorben, supra*, with apparent approval, a decision which was denied enforcement by this Court, 345 F.2d 346 at 349.

Administrative Law Judge in the instant matter came to the remarkable conclusion that counsel was entitled to ask only one question, and that had to be asked by secret ballot.[63]

Here, the promise for the §8(a)(5) charge was the Union's majority status. But when counsel attempted to promptly investigate this assertion, and prepare a defense against it, their client was charged with another unfair labor practice. It would seem that the Pharmacy was expected to submit to one alleged violation, or incur a second defending it. This is an unsatisfactory arrangement. It is simply another manifestation of the "damned if you do, damned if you don't" approach, for which this Court has criticized the Board with respect to faulting the conduct of counsel. *See, Schwarzenbach-Huber Co.* v. *N.L.R.B.*, 408 F.2d 236, 249, 70 L.R.R.M. 2805, 2814 (2d Cir. 1969).

The proper standard, we think, should be whether the questions asked are "arguably relevant" to the issues raised in the complaint. This would afford counsel the latitude he requires in preparing his client's case. Apparently, this was once the Board's position. In *Partee Flooring Mill*, 107 N.L.R.B. 1177, 1180 (1956), the Board dismissed a §8(a)(1) allegation regarding pre-trial interviewing, holding:

> "Although . . . some of the questions asked . . . were not necessary for trial preparation, we must afford counsel full opportunity to prepare to defend his client."

The questions asked here were at least arguably relevant to the issues raised, and were necessary for direct and cross-examination (84a, n.34; 251a-254a). They were also pertinent to the other issues discussed by the Judge, particularly the issue of the viability of the Guild (73a).

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[63] As noted, the Board did not affirm the latter conclusion. However, it did not reject it either.

These questions should not have been the basis of an unfair labor practice charge.[64]

E. The Board Erroneously Concluded That The Pharmacy Unlawfully Withdrew Recognition And Thereafter Polled Employees Without Notice To The Guild.

The Board found that the Pharmacy "denied . . . further recognition" to the Guild and then sought to "rely on evidence of employee dissatisfaction disclosed through the expediency of a poll" to justify its withdrawal (79a, 84a, 118a, n.2). This finding has no evidentiary basis in the record.

1. The asserted denial of recognition.

There is no evidence to support this conclusion. The complaint alleged only that commencing on April 19, 1973, the Pharmacy has "refused . . . to bargain in good faith" concerning the terms of a new collective bargaining agreement (8a). The issue of denial of recognition was not charged or litigated (127a-129a). *N.L.R.B.* v. *Majestic Weaving Co., Inc.*, 355 F.2d 854 (2d Cir. 1966). Had it been, the evidence would have demonstrated that the Pharmacy not only never withdrew recognition, but, on the contrary, continued to recognize and deal with the Guild after April 19th.

2. The asserted polling of employees.

The results of counsel's interviewing were never intended to be introduced into evidence as a poll on the issue of the Guild's majority support, and in fact they were not. Indeed, the individual results were not even disclosed to Pharmacy management, see *supra*. p. 59. Rather, counsel planned to call the pharmacists to testify personally and attempted to do so.

3. The asserted lack of notice.

The finding that Pharmacy counsel violated §8(a)(5) by interviewing pharmacists "without notice to the Guild" also

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[64] We note that this Court has held, "The absence . . . of a legitimate purpose for questioning does not tend to render the interrogation coercive absent a history of anti-union animus." *N.L.R.B.* v. *Dorn's Transportation Co., supra*, 405 F.2d at 714. No such history was present here.

is erroneous (89a, 117a). The Board has never held that counsel is under an obligation to consult with, notify or advise a collective bargaining representative of his desire to interview unit employees in preparation for trial, especially in defense of charges filed by that representative.

F. Enforcement Of The Board's Order Is Not Warranted In The Circumstances Of This Case.

The Fifth Circuit discussed the right to counsel in an administrative hearing in *N.L.R.B.* v. *Guild Industries Mfg. Corp.*, 321 F.2d 108 (5th Cir. 1963), stating:

> "The right to counsel before an administrative agency such as the Labor Board no less than before the courts is a precious right and one to be preserved and given effect. To charge counsel as here, and put him on trial as a Respondent along with the employer is tantamount to a restraint, intimidatory and coercive in nature." 321 F.2d at 112.[65]

Where, as here the only alleged unlawful interrogation is committed by attorneys acting in their professional capacity in defense of a Board charge, in no way involves the misconduct of their client, and reveals no demonstrable coercive impact or likelihood of recurrence, we submit most earnestly, that the Board's Order should not be enforced.

POINT VI

The Board's Failure to Sever the Attorney Interviewing Issue Infringed Upon the Pharmacy's Right to the Effective Representation of Counsel.

Prior to hearing, Pharmacy counsel sought an Order of the Chief Administrative Law Judge severing the attorney interviewing issue from the rest of the case and directing an earlier trial thereon (16a-17a). We stated:

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[65] Such restraint is no less intimidatory or coercive because it is imposed on an attorney as an agent, rather than as a named respondent. Counsel's function is to defend his client against existing charges, not to incur additional ones. If he risks the latter, his functioning is necessarily impaired.

> "General Counsel's allegation that counsel's interviewing of employees was unlawful has a chilling effect upon Respondent and its counsel. If counsel cannot undertake to effectively represent its client without risking an amended complaint alleging additional violations, its efforts will be unduly inhibited and its professional responsibilities compromised." (16a).

General Counsel opposed this motion (18a-20a)[66] and it was denied by Administrative Law Judge Arthur Leff (21a-22a).[67] The Pharmacy thereafter sought special permission to appeal this ruling to the Board (23a-26a).[68] This request was also denied, without comment (68a), upon opposition by General Counsel (27a-29a).[69]

The Pharmacy's request for severance should have been granted. The United States District Courts have long followed a practice of bifurcation of proceedings in appropriate cases. F.R. Civ. P. 42(b) ("Separate Trials"), provides, in part:

> "The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue. . . ." [70]

Here, an earlier trial of the issue of the propriety of counsel's interviewing would have avoided the prejudice to the Pharmacy in defending the refusal to bargain charge.

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[66] Opposition To Respondent's Motion For A Protective Order, etc., dated July 20, 1973.

[67] Order On Respondent's Motion For A Protective Order, etc., dated August 3, 1973.

[68] Respondent's Request For Special Permission To Appeal To The National Labor Relations Board, dated August 7, 1973.

[69] Opposition To Respondent's Request For Special Permission To Appeal, etc., dated August 9, 1973.

[70] *Cf.* 29 C.F.R. §102.33. General Counsel properly noted in his Opposition To Respondent's Motion For a Protective Order, etc., *supra* n. 1, that "The Federal Rules of Civil Procedure . . . apply in Board Complaint Proceedings, so far as practical. . . ." (18a). See, *Local 138, Operating Engineers* v. *N.L.R.B.*, 321 F.2d 130 (2d Cir. 1963); *Associated Home Builders* v. *N.L.R.B.* 352 F.2d 745, 754 (9th Cir. 1965).

Surely, there is an inherent unfairness in a quasi-judicial system in which counsel for one side can circumscribe the parameters of his adversary's trial preparation and advocacy by threatening to lodge additional charges, as General Counsel did in the instant matter, by stating that Counsel's conduct "if repeated would clearly warrant amendment of the complaint." (85a, 18a-20a.) A prior trial of this issue would have removed the inhibiting effect on the outstanding charge and the threat of additional charges on counsel's effectiveness in representing its client. It would have defined counsel's proper role and permitted appropriate trial preparation.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner prays that its petition for review be granted, and that the Board's cross-application for enforcement of its Order be denied in its entirety.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Petitioner
261 Madison Avenue
New York, New York 10016

Dated: New York, New York
September 23, 1974.

Of Counsel

ROBERT LEWIS
ROGER S. KAPLAN

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK, ss.:

Jules Goldner, being duly sworn, deposes and says that he is over 18 years of age. That on the 13th day of December 1974, he served 2 copies of the within Petitioner's Brief upon Robert G. Sewell, attorney for the above named Respondent, by depositing same securely enclosed in a post-paid wrapper in a branch depository of the United States Post Office at Greenwich and Vestry Streets, New York City, addressed to said attorneys at No. 1717 Pennsylvania Ave., N.W. Washington, D.C. 20570, the address given by them where they regularly receive mail. And 2 copies on:

Thomas Canafax, Jr. Esq. (Amicus Curiae) of Borovsky, Erlich & Kronenberg
120 South La Salle Street
Chicago, Ill. 60603

Sworn to before me this
13th day of December 1974

GEORGE MILLER
Notary Public, State of New York
No. 24-7942070
Qualified in Kings County
Commission Expires March 30, 1976

George Miller

Jules Goldner